IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1551

WALTER J. SAMPSON, BERNARD GREENBAUM, ABNER J. MESIROW, and ARTHUR A. BOGEAUS, Co-Partners, d/b/a SOUTHEASTERN INDUSTRIAL DEVELOPMENT DISTRICT, *Petitioners,*

and

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, *Respondent,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Claims

BRIEF FOR THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, RESPONDENT, IN OPPOSITION

GLASSIE, PEWETT, BEEBE & SHANKS,
HERSHEL SHANKS,
MICHAEL J. RUANE,
1819 H Street, N.W.,
Washington, D. C. 20006,
Attorneys for Respondent, Equitable Life Assurance Society of the United States.

Of Counsel:
JOHN F. NUGENT
ASSISTANT GENERAL COUNSEL
EQUITABLE LIFE ASSURANCE SOCIETY
OF THE UNITED STATES

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statute Involved	2
Statement	3
Argument	4
Conclusion	7

TABLE OF CASES

CASES:

Beaconwear Clothing Co. v. United States, 355 F.2d 583 (Ct. Cl. 1966)	6
Great American Insurance Company v. United States, 397 F.2d 289 (Ct. Cl. 1968)	5
Hadden v. United States, 132 F. Supp. 202 (Ct. Cl. 1955)	5
Merritt v. Bartholick, 36 N.Y. 9 (1867)	6
Ralston Steel Corp. v. United States, 340 F.2d 663 (Ct. Cl. 1965), cert. denied 381 U.S. 950 (1965)	5
Spencer v. Spencer, 94 N.Y. 353 (1884)	6
United Pacific Insurance Co. v. United States, 358 F.2d 966 (Ct. Cl. 1966)	6
United States v. Sherwood, 312 U.S. 584 (1941)	4

STATUTES:

28 U.S.C. 1255(1)	2
28 U.S.C. 1491	2

MISCELLANEOUS:

Stern & Gressman, Supreme Court Practice, Sec. 4.6 (4th ed. 1969)	6

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OPINIONS BELOW

The opinion of the trial judge finding the United States liable (Pet. App. 1a-34a) is not reported. The Court of Claims decision affirming the Government's liability (Pet. App. 35a-36a) is reported at 204 Ct. Cl. 920 (1974).

The opinion of the Court of Claims holding that the award against the United States belongs to petitioners (Pet. App. 37a-48a) is not reported. The opinion of the Court of Claims on rehearing *en banc,* reversing the panel and holding that the award belongs to respondent Equitable (Pet. App. 53a-79a) is reported at 529 F.2d 1299 (1976).

JURISDICTION

The judgment of the panel of the Court of Claims was entered on May 14, 1975 (Pet. App. 37a). A petition for rehearing *en banc,* timely filed, was granted; and the judgment of the Court of Claims on rehearing was entered on January 28, 1976 (Pet. App. 53a). The petition for writ of certiorari was filed on April 26, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Did the Court of Claims have jurisdiction to decide whether the award against the Government belonged to petitioners, on the one hand, or to respondent Equitable, on the other. This respondent believes the answer should be "yes".

2. Does the Court of Claims decision *en banc* conflict with any New York state decision and, if so, is this conflict of such a nature that it should be resolved by this Court. This respondent believes the answer to both parts of this question should be "no".

STATUTE INVOLVED

The statute involved, 28 U.S.C. 1491, provides in pertinent part as follows:

> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

STATEMENT

Petitioners were the owners of a building in Syracuse, New York, known as the Chimes Building, which was leased to the United States (Pet. App. 13a). Respondent Equitable is the holder of a first deed of trust on the Chimes Building, which secures a debt in the original principal amount of $1,650,000.00 (Pet. App. 58a).

When the Government vacated the building at the termination of its lease, the damaged condition of the building gave rise to a claim against the Government which petitioners asserted in the Court of Claims (Pet. App. 1a). Respondent Equitable promptly intervened, alleging that any award belonged to it, by virtue of a specific provision in its deed of trust assigning to respondent Equitable all rights to the award (Pet. App. 54a).

A panel of the Court of Claims ruled that the award belonged to petitioners (Pet. App. 48a). On rehearing *en banc,* the full court reversed the panel and concluded that the award belonged to respondent Equitable (Pet. App. 73a).

On the merits, the case turns on the meaning of a specific provision in the deed of trust. Petitioners contend that the lower court's decision conflicts with applicable New York state decisions and that this conflict should be resolved by this Court. *In limine,* peti-

tioners contend that the Court of Claims had no jurisdiction to decide whether the award against the Government belonged to petitioners or respondent Equitable. Respondent Equitable rejects both of these contentions.

ARGUMENT

1. Although petitioners failed to raise the jurisdictional issue below, they now contend that *United States* v. *Sherwood,* 312 U.S. 584 (1941), requires dismissal of this suit for lack of jurisdiction. Petitioners reliance on *Sherwood* is misplaced.

Sherwood was a Tucker Act suit in the District Court in which a judgment-creditor sued both the judgment-debtor and the United States in the hope of reducing to judgment, the judgment-debtor's unliquidated claim against the Government. The judgment-creditor was in effect bringing a derivative action in the hope of realizing on the judgment-debtor's claim against the Government. The judgment-creditor (plaintiff) admittedly had no direct claim against the Government and could not sue the Government on its own behalf. Moreover, the judgment-debtor was admittedly a necessary party defendant. This Court quite properly ruled that the Tucker Act did not confer jurisdiction on the judgment-creditor's derivative claim against the Government.

The *Sherwood* case is obviously a far cry from the instant case where both respondent Equitable and petitioner contend that the award against the Government belongs to them. Petitioners have sued the Government; and respondent Equitable has sued the Government. The Court of Claims has ruled only as to whether the award against the Government belongs to

respondent Equitable or to petitioners. Clearly, the Tucker Act confers jurisdiction on each of these independent claims against the Government (even though one of the claims must necessarily be rejected). See the carefully reasoned opinion of Judge Davis in *Ralston Steel Corp.* v. *United States,* 340 F.2d 663 (Ct. Cl. 1965), *cert. denied,* 381 U.S. 950 (1965), in which he distinguishes *Sherwood* on the same ground as we have done above. See also *Hadden* v. *United States,* 132 F. Supp. 202 (Ct. Cl. 1955) and Chief Judge Cowan's decision in *Great American Insurance Company* v. *United States,* 397 F.2d 289 (Ct. Cl. 1968):

> . . . [T]his court has, without a single dissent in any case, uniformly held that, where the principal suit is on a claim to recover a contract balance held by the Government as a stakeholder, the court has jurisdiction to determine whether the plaintiff or a third party, who claims an interest in the stake, is entitled to recover the money from the United States. [397 F.2d at 292]

Even Judge Laramore who dissented in the *Great American Insurance Company* case, recognized that where the Government is a mere stakeholder, the Court of Claims has jurisdiction to decide which of two direct claimants is entitled to the award. Judge Laramore dissented on the ground that one of the parties there did not have a direct claim against the Government. In the instant case, however, the Government *is* a mere stakeholder; the Government concedes that it owes the amount of $292,574.26 either to petitioners or to respondent Equitable. The Government has taken no position as to who owns the award. With each of the parties making a direct claim against the Government, it is clear that the Court of Claims had jurisdiction to decide the validity of these claims.

2. Petitioners contend that the Court of Claims decision on the merits conflicts with a number of New York state decisions.[1] This claim is made with regard to several issues and with regard to several cases ruling on these issues. However, the fact of the matter is that none of these New York cases is more than tangentially relevant to the issues in this case. Indeed, some of the New York cases which petitioners contend conflict with the instant case are cited for the first time by petitioners in this Court, e.g., *Spencer* v. *Spencer,* 94 N.Y. 353 (1884) and *Merritt* v. *Bartholick,* 36 N.Y. 9 (1867). None of the cases which allegedly conflict with the instant case are even cited, let alone said to be dispositive, by Judge Nichols in his dissent to the *en banc* decision below.

The critical issue in this case is simply the meaning of a particular word, "award", contained in the applicable deed of trust. There is no New York case which comes even close to disposing of this issue. The kind of "conflict in principle" which petitioners allege is simply an effort to cast an issue which is of interest solely to the parties into a cert-worthy mold. That attempt must fail.

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[1] Petitioners also claim that the decision on the merits conflicts with two earlier decisions of the Court of Claims; Beaconwear Clothing Co. v. United States, 355 F.2d 583 (1966) and United Pacific Insurance Co. v. United States, 358 F.2d 966 (1966) (Pet. 14). However, this alleged conflict exists only in the minds of petitioners. Even Judge Nichols, who dissented from the *en banc* decision does not claim such a conflict. Indeed, he does not even cite the allegedly conflicting cases in his dissent. But, in any event, such a conflict would not be grounds for certiorari, especially when the latest decision is by the court sitting *en banc*. *See* Stern & Gressman, *Supreme Court Practice,* Sec. 4.6 (4th ed. 1969).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

GLASSIE, PEWETT, BEEBE & SHANKS,

By
HERSHEL SHANKS,
MICHAEL J. RUANE,

1819 H Street, N.W.,
Washington, D. C. 20006,

Attorneys for Respondent, Equitable Life Assurance Society of the United States.

Of Counsel:

JOHN F. NUGENT
ASSISTANT GENERAL COUNSEL
EQUITABLE LIFE ASSURANCE SOCIETY
OF THE UNITED STATES
1285 Avenue of the Americas
New York, New York 10019